No. 97-1557

In The Supreme Court of the United States

OCTOBER TERM 1997

SHARON MARIE PLAIN,

Petitioner,

v.

SEARS ROEBUCK AND COMPANY;
SEARS STORE 2755,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY PETITION

1. Whether Ms. Plain should have filed a separate administrative charge with the Equal Employment Opportunity Commission (EEOC) prior to instituting her suit on the issue of discriminatory termination when she alleged systemic violations committed by Sears.

2. Whether Ms. Plain filed a timely administrative charge of discrimination challenging the alleged denials of accommodation, harassment and promotion when she alleged a systemic violation in these areas by Sears and when she sought the EEOC's assistance as early as 1992.

3. Whether the court below erred when it adopted Sears' reasoning and ruled that Ms. Plain was not a qualified individual with a disability under the Americans With Disabilities Act when she alleged widespread discriminatory systemic violations.

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Respondent, Sears Roebuck and Company, respectfully opposes the Petition for Writ of Certiorari submitted by Petitioner, Sharon Plain.

I. STATEMENT OF THE CASE

A. Proceedings Below

A panel of the United States Court of Appeals for the Fourth Circuit affirmed, without dissent, the trial court's grant of summary judgment. (App. 1-5.) The trial and appellate courts found that Ms. Plain had failed to timely file the requisite charge of discrimination under the Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12213 (West. Supp. 1995), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq. Ms. Plain chose not to seek re-consideration by the Appeals Court panel nor did she seek en banc consideration of her appeal before the full Fourth Circuit.

B. Statement of Facts

The Petition's Statement of the Case and its Arguments omit significant facts, mischaracterize other facts and misrepresent the Panel's consideration of the full record before it. Thus, Respondent submits the following record facts:

Prior to her federal court Complaint, Plaintiff filed only a single administrative charge of employment discrimination. (App. 4-5). This single charge was filed on February 13, 1995.[1] There was no administrative charge filed in 1994, 1993 or 1992. The EEOC issued its right-to-sue notice on September 25, 1995. (App. 95-98).

Plaintiff's federal court Complaint (App. 6-12) identified specific dated events of alleged discriminatory conduct:

1. Plaintiff alleged that on or about March 2, 1992, she "was subjected to harassment." (App. 9)
2. Plaintiff alleged that "on or about August 10, 1993, Doug Turner, Store Manager, announced at a meeting to the other employees that Plaintiff would not be placed on a staff schedule due to health and her doctor's recommendation. . ." (App. 9) (emphasis added).

Other events are also significant which confirm Plaintiff's untimely claims in this litigation:

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[1] The Appendix accompanying the Petition fails to reflect the charge filing date as stamped by the EEOC. (App. 15-20) However, the Panel's Opinion reflects the actual filing date as February 13, 1995. (App. 4)

1. Plaintiff's last day of work at Sears was on January 5, 1994. (App. 3), more than a full year before she filed her single EEOC charge on February 13, 1995.

2. Plaintiff's Complaint alleged that on April 28, 1995, she was "terminated . . . by failure of Defendant, Sears, to reasonably accommodate Plaintiff." (App. 9-10) Plaintiff's alleged April 1995 termination was never challenged by any EEOC administrative charge. The alleged termination occurred more than 15 months after her last day of work on January 5, 1994 and more than two months after her only EEOC charge was received and date-stamped by the EEOC on February 13, 1995.

3. Because both courts below dismissed Plaintiff's claims based on the untimeliness of her single EEOC charge, the Appeals Court did not need to resolve the merits of Plaintiff's claims of sex and disability discrimination. (App. 5). Thus, this case presents no ". . . court of appeals. . . decision in conflict with the decision of another United States court of appeals. . ."[2] regarding her sex or alleged disability claims.

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[2] See S. Ct. Rule 10(a).

II. REASONS FOR DENYING THE WRIT OF CERTIORARI

A. The Trial and Appellate Courts Correctly Determined That Plaintiff Failed To File A Timely Charge Of Discrimination.

Under the anti-discrimination laws, a plaintiff must file an EEOC charge of discrimination "within one hundred and eighty days after the alleged unlawful employment practice occurred." Sec. 706(e)(1) of Title VII of the Civil Rights Act of 1964; Sec. 107(a) of the Americans With Disabilities Act of 1990. Appeals courts strictly enforce the limitation periods found in the anti-discrimination laws. For example, in Hamilton v. 1st Source Bank, 928 F.2d 86, 90 (4th Cir. 1990), the appeals court stated that

> In setting a 180-day period in which employees could file complaints with the EEOC, Congress considered and balanced the competing policies of investigating and settling claims promptly, and protecting the aged from discrimination. We cannot second-guess its judgment.

Id. The Court thus remanded the case with "directions to dismiss it as untimely filed." Id.

In this case, Plaintiff's single EEOC charge was filed on February 13, 1995. Upon the facts of this case, this could only represent a timely charge of discrimination for events occurring

between August 17, 1994 and February 13, 1995. However, in her federal court Complaint, Plaintiff specified the actual dates in 1992, 1993 and 1995 when the discriminatory events allegedly occurred. (App. 9-10) Thus, Plaintiff's administrative charge was untimely as established by juxtaposing the undisputed facts with the allegations in Plaintiff's Complaint.[3]

In her Petition, Plaintiff argues that she "initiate[d] charges with the EEOC" because she "made contact" with the U.S. Department of Justice on July 25, 1992 and because she corresponded with the EEOC on August 14, 1993. (Pet. 6-7). Specifically, Plaintiff presented the lower courts a portion of an undated affidavit[4] that "reported" that she wrote a letter to the

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[3] Plaintiff's Complaint also made nonspecific allegations of discriminatory conduct. For example, Plaintiff claimed that she was denied promotions which had been awarded to similarly situated male employees. (App. 9) However, these claims were properly dismissed because they were not raised in a timely administrative charge. (App. 4-5) Plaintiff last worked for Defendant on January 5, 1994 but she did not file her administrative charge until more than a year later, on February 13, 1995. (App. 4) Since she was not working after January 5, 1994, no alleged unlawful promotion denials could have occurred within the 6-month period preceding the filing of her February 13, 1995 administrative charge.

[4] App. 101, line 7, reflects a day, month and year of a

(continued...)

Department of Justice in July 1992; that she wrote the EEOC's Washington office a letter in August 1993; that after she later contacted the Charlotte, North Carolina EEOC office, she was advised to contact the Raleigh [N.C.] office; however, Plaintiff's own evidence confirmed that she "decided not to contact the Raleigh office because [she was] aware of other individuals who filed charges with that office and did not receive favorable outcomes." (App. 102-03). None of the allegations in Plaintiff's documents presented to the lower courts, even if true, would suffice to satisfy the mandatory requirement for filing a charge of discrimination.

According to the statutes, administrative charges under the ADA and Title VII "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." To prevent the triumph of form over substance, courts have "scrutinized the circumstances under which a document is submitted" to the EEOC to determine if the Commission's charge-filing requirements have been satisfied. Steffen v. Meridian Life Ins. Co., 859 F.2d 534,

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[4](...continued)
subscription and oath; however, this affirmation is part of the separate, preceding document, her single EEOC charge (App. 98-101); it is not part of the Affidavit.

543 (7th Cir. 1988), cert. denied, 491 U.S. 907 (1989). In Waiters v. Robert Bosch Corporation, 683 F.2d 89 (4th Cir. 1982), the appeals court conducted such an analysis to determine if the requirements for a sufficient EEOC charge of discrimination had been satisfied. Unlike the present case, the plaintiff in the Waiters case had submitted a sworn and notarized affidavit to the EEOC which contained "a detailed account of . . . alleged discriminatory conduct." Id. at 90. The Court found, on those facts, that the plaintiff's affidavit was sufficient to satisfy the charge-filing requirements. Id. The Court reasoned that the affidavit "identified the parties, the nature of the discrimination, the date of the discriminatory act and the circumstances supporting the charge." Id. at 92. Compare Steffen, 859 F.2d at 542. (not all documents which "names the respondent and generally alleges discrimination" satisfy charge-filing requirements of EEOC regulations)[5]; Diaz

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[5] The instant Petition mischaracterizes a 1994 letter from Sears to Ms. Plain (App. 121) as evidence of her "charges." Page 9 of the Petition contains two references to this Sears' letter to her as evidence of her "attacking a system-wide violation of the ADA." Id. There is no record evidence that this letter from her employer (or the information in it) was ever made part of any charge of discrimination. Thus, Petitioner gains no support from this letter to help her fulfill

(continued...)

v. Minn. Mining & Mfg. Co., 88 F.3d 672, 676 (8th Cir. 1996) (EEOC questionnaire insufficient as charge of discrimination, subsequently filed charge not an amendment to questionnaire).

Also, a charging party cannot satisfy administrative prerequisites by filing a charge with an agency other than the EEOC.[6] Sec. 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b); Sec. 107(a) American With Disabilities Act of 1990, 42 U.S.C. § 12117 (adopting procedures of 42 U.S.C. 2000e-5); see also Bledsoe v. Pilot Life Ins. Co., 473 F. Supp. 864, 866 (M.D.N.C. 1978), aff'd, 602 F.2d 652 (4th Cir. 1979) (filing charge with the Wage and Hour Division of the Department of Labor does not satisfy EEOC filing requirement).

In this case, Plaintiff's vague descriptions of efforts to contact the EEOC and the Justice Department in 1992 - 1993

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[5](...continued)
her charge filing requirements under the statutes.

[6] Plaintiff's reliance on Stallworth v. Monsanto Co., 13 Fair Empl. Prac. Cas. (BNA) 826 (N.D. Fla. 1975), to the extent that it attempts to overcome this rule, is misplaced. In that case, the charge was filed with the EEOC and, under the regulations which allow a charge to be filed "on behalf" of an aggrieved person, the unusual manner of filing had no impact on the validity of the charge. Id. at 828.

fall far short of stating facts that would be sufficient to satisfy the legal requirements for a timely charge of discrimination. Notably, Plaintiff established nowhere in the record that she made the contacts under oath or affirmation. Moreover, her vague allegations demonstrate only that she made "inquiries" to the agencies. Plaintiff's undated affidavit indicates that she sent the alleged letter to the EEOC in 1993 not to assert her rights, but to "ask specific questions concerning her rights as a disabled person." (App. 102). Thereafter, Plaintiff was eventually advised to contact the appropriate EEOC office in Raleigh, N.C. but that she "decided not to contact" that office (emphasis added). (App. 102-03)

Moreover, Plaintiff has not shown that Sears had any notice from any administrative agency in 1992 and 1993 that Plaintiff ever raised these concerns; thus, Sears was deprived of the opportunity to seek a pre-litigation resolution of her concerns through the EEOC. See Diaz, 88 F.3d at 677. Furthermore, the record contains no evidence of any investigation or findings based on Plaintiff's alleged prior "contact" with the EEOC about her alleged disability concerns. However, unless the EEOC had actually found sex discrimination as a result of an investigation into Plaintiff's disability concerns, it is clear that her prior "contact" cannot

support her present claims of sex discrimination. See, e.g., Stehle v. General Mills Restaurant, 875 F. Supp. 320, 323 (D.S.C. 1994) ("civil suit under Title VII is limited to discrimination charged in the report to the EEOC or to discrimination actually found by the EEOC upon investigation of the original charge." (citing EEOC v. General Electric Co., 532 F.2d 359, 366 (4th Cir. 1976)).

B. The Courts Below Correctly Determined That Plaintiff Failed To Challenge Her Alleged Employment Termination In An EEOC Charge Of Discrimination.

In her Petition, Plaintiff attempts to explain her failure to file an administrative EEOC charge which can jurisdictionally support her termination claim in this litigation. (Pet. 4-5). Specifically, Plaintiff argues that it was unnecessary for her to file an administrative charge challenging her alleged April 28, 1995 termination because it was merely a form of "harassment" reasonably related to the only charge she filed in February 1995.

Plaintiff's arguments cannot justify her failure to file a timely charge for several reasons. First, because her February 13, 1995 EEOC charge was found to be "untimely" by the courts below, it does not matter legally whether a subsequently arising claim is "like or related" to the matters challenged by the

untimely charge. Stated another way, any analysis about the proper judicial scope of an EEOC charge necessarily arises only where there is a timely filed charge. Petitioner cannot bootstrap a subsequent termination claim onto an untimely charge. Otherwise, the statutes' timely filing requirements become a nullity. Thus, Petitioner's argument that her 1995 termination was another form of harassment (or, alternatively, a failure to accommodate her) are indeed meritless and were properly rejected by the Appeals Court. (App. 5)

Next, because Petitioner failed to file a timely charge, there is no conflict between the courts of appeal regarding the judicial scope of an EEOC charge. Thus, the Petition's Argument I relating to her termination claim fail to justify the High Court's consideration. (See S. Ct. Rule 10(a)).

C. There Was No "Amendment" To The Untimely EEOC Charge.

Petitioner relies heavily upon an EEOC regulation allowing amendments to an administrative charge filed with the Commission (Pet. 8-10). This argument is misplaced for several reasons. First, because there was no timely filed charge, there was no basis for applying any regulation allowing amendments.

Next, in this case, even if, arguendo, the February 1995 EEOC charge was timely for some employer conduct or decision, there are absolutely no facts that can demonstrate any effort by Ms. Plain to "amend" the charge while it was before the EEOC. For example, the record reflects no attempt to contact the EEOC after her alleged April 1995 termination. The Petition implicitly recognizes this factual deficit because it attempts to argue that Plaintiff's judicial opposition to Sears' motion to dismiss her federal court Complaint should be accepted as an "amendment" to her EEOC charge. (Pet. 9-10). Such an argument mocks Congress' statutory framework under Title VII and the ADA. This illogical argument plainly would allow a response in court documents to expand, without limitation, what Congress has already declared to be a necessary predicate to any court actions; i.e., the administrative charge itself. Neither Congress nor the EEOC could have contemplated such an anomalous result.

D. The Trial Court's Analysis Of The Disability Claim Was Not A Basis For The Appeals Court Decision.

Petitioner's arguments in Section III of the Petition relate only to a footnote in the trial court's order (App. 147). As shown by the panel's Opinion (App. 1-5), this analysis was not relied upon by the Appeals Court. The Petition inappropriately

attempts to present an issue not addressed by the Appeals Court. Thus, there can be no conflict with any other court of appeals. See S. Ct. Rule 10.

E. The Lower Courts' Factual Analysis Does Not Justify Review.

The Petition's almost exclusive reliance upon the materials Plaintiff presented in opposition to Sears' motion to dismiss her Complaint demonstrates why a Writ should not be issued in this case. Supreme Court Rule 10 specifies that erroneous factual findings rarely justify the Court's consideration by a writ. This Petition presents nothing more than Plaintiff's attempt to reargue factually her opposition to the employer's motion to dismiss. Thus, it does not begin to represent the type of issue needing the High Court's time and attention.

Dated this 19th day of April, 1998.

Respectfully submitted,

/s/ James B. Spears, Jr.

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